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Archie Nielson and Sylvia W. Nielson v. C. A. Rasmussen, C. Wesley Rasmussen, and Bernice C. Rasmussen : Brief of Respondent

Utah Supreme Court

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BRIEF

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ARCHIE NIELSON and SYLVIA W. NIELSON, his wife,

Plaintiffs and Appellants,

v.

C. A. RASMUSSEN, C. WESLEY RASMUSSEN and BERNICE C. RASMUSSEN, his wife,

Defendants and Third-Party Plaintiffs,

v.

BERT CARTER and BLANCH G. CARTER, his wife,

Third-Party Defendants and Respondents.

Case No. 14,376

BRIEF OF RESPONDENTS

Appeal from Judgment of the Fourth Judicial District Court of Utah County, Honorable J. Robert Bullock, Judge

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IN THE SUPREME COURT OF THE

STATE OF UTAH

ARCHIE NIELSON and SYLVIA W. NIELSON, his wife, Plaintiffs and Appellants, v. C. A. RASMUSSEN, C. WESLEY RASMUSSEN and BERNICE C. RASMUSSEN, his wife, Defendants and Third-Party Plaintiffs, v. BERT CARTER and BLANCH G. CARTER, his wife, Third-Party Defendants and Respondents.	Case No. 14,376

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an action to impose a constructive trust upon certain property purchased from the Appellants by the third-party defendants. Appellants claim that the third-party defendants agreed to hold four (4) building lots sold to them in trust for the Defendants and Third-Party Plaintiffs.

DISPOSITION IN THE LOWER COURT

The case was tried without a jury on the 23rd and 24th day of September, 1975, before the Honorable J. Robert

Bullock. The tiral court found in favor of the Defendants Carter and against the Plaintiffs, no cause of action. The Plaintiff objected to the Findings of Fact and Conclusions of Law of the trial court and made a motion to make additional findings and a motion for a new trial. On November 20, 1975, the trial court denied Plaintiffs' objection and motions. The Plaintiffs appeal the decision of the trial court.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the Court affirm the rulings of the trial court.

STATEMENT OF FACTS

Respondents disagree with Appellants' Statement of Facts in the following particulars:

In January of 1966 Plaintiffs Nielsons brought suit against the Rasmussens. (R. 4-8) In March or April of 1966 the Defendant Bert Carter started negotiating with the Plaintiffs for the purchase of a part of their property comprised of approximately 15 acres. (Tr. 181, lines 3-9) During the course of negotiations with the Plaintiffs, Defendant Bert Carter had occasion to be near the property in April of 1966 with Wesley Rasmussen and discussed with him Rasmussen's desire to acquire four (4) lots from the 15 acre plot. (Tr. 181, lines 15-21) On May 18, 1966, the Defendants Carters purchased approximately 15 acres of ground from the Plaintiffs as shown by Exhibits 1 and 2. The purchase price for said property was $19,100. (Tr. 38, lines 21-30) Appellants' Statement of Facts states that problems arose as to the description

of the property being transferred. This statement of fact is not supported by the evidence. The documents Exhibit 1 and 2 show the full legal description of the property transferred to the Defendants Carter by the Plaintiffs on May 18, 1966, both contained in the purchase contract and in the Deed of Transfer. The preliminary discussion with Rasmussens concerning the four (4) lots was not included in the first contract of purchase. (Exs. 1 & 2)

Appellants state that Defendants Carter induced the Plaintiffs Nielson to transfer all of the property on the promise that they would later transfer four (4) lots to the Rasmussens. This was not the finding of the trial court nor the facts. (R. 160; Tr. 122, lines 1216; Tr. 134, lines 3-12, 23-28) The true facts are that Defendants Carter purchased 15 acres of ground from the Plaintiffs Nielson, with the Plaintiffs Nielson retaining other parts of their property. (Ex. 7) Defendant Bert Carter admits discussing the transfer of lots with Rasmussen as stated in Appellants' Statement of Facts, but this was prior to Defendants Carter's purchase of the property from the Plaintiffs. Rasmussen only met with Plaintiffs Carter on the property once and that was before the purchase from Plaintiffs. (Tr. 150, lines 8-9; Tr. 118, lines 10-14; Tr. 181, lines 15-30; Tr. 150, lines 4-15) Defendant Bert Carter knew that Rasmussens were in a dispute over lots with the Plaintiffs Nielson. (Tr. 181, lines 22-30; Tr. 182, lines 1-21) After the purchase of the 15 acres by the Defendant Bert Carter in

May, 1966, Rasmussens and Plaintiffs Nielson entered into a settlement agreement on April 12, 1967. (Ex. 3) Defendants Carter were not present at the signing of the settlement agreement and did not have any knowledge of the negotiations or the settlement agreement as testified to by the Plaintiff Archie Nielson. (Tr. 75, lines 22-24; Tr. 76, lines 5, 16-26) In January of 1974 Rasmussens answered the complaint of Plaintiffs Nielson which had been filed in 1966 and also counterclaimed against Plaintiffs Nielson. Rasmussens further filed a third-party complaint against Defendants Carter, which was dismissed upon motion by the trial court. (R. 24, 25 & 37) On February 7, 1974, Plaintiffs answered Rasmussens' counterclaim and filed a complaint against Defendants Carter nearly eight years after the contract for purchase and deed to Defendants Carter had been executed and after Carter had taken possession of the property and completed payment for the property.

Appellants' Statement of Facts sets forth allegations that Defendants Carter participated in the settlement agreement between Defendants Carter and Rasmussens. This is contrary to the facts found by the trial court and presented wherein Plaintiff Archie Nielson admitted that Defendants Carter did not participate or have knowledge of the settlement between Plaintiffs Nielson and Rasmussens. (Tr. 75-76).

At the time of the execution of the purchase agreement by the Defendants from the Plaintiffs, the written agreement

comprised the entire agreement between the parties as testified to by Plaintiffs Nielson as shown in the transcript (Tr. 29-30) wherein the question was asked of Plaintiff Archie Nielson:

> Q: Now was there any other agreement you had with Mr. Carter at the time of the signing of that agreement other than that he would let Mr. Lewis see a copy of the agreement?
>
> A: No

At the time of the signing of the purchase agreement the attorney for Defendants, Mr. Hugh Vern Wentz, read the agreement to the Plaintiffs and their daughter who was present, in the presence of Defendant Bert Carter. (Tr. 165) At that time no questions were asked by the Plaintiffs' daughter with regard to the alleged four (4) lots to be transferred to Rasmussens. This was an arm's length transaction between parties who had had no prior dealings. Plaintiffs so testified. (Tr. 26, lines 17-20; Tr. 52, lines 22-26) After the payments had been completed by the Defendants Carter on May 5, 1972, the Plaintiffs entered in their own handwriting "paid in full" on the purchase agreement by which Defendants were making purchase of the property. (Tr. 38, lines 21-30) Again at that time no question was raised by the Plaintiffs regarding the alleged four (4) lots in any manner whatsoever. (Testimony of Sylvia Nielson, Tr. 96, lines 27-30; Tr. 97, lines 1-3)

At the commencement of the lawsuit the Plaintiffs filed a Lis Pendens covering all property of Defendants Carter although they allegedly claimed only four (4) lots. By stipulation

the parties released all but four (4) lots so as not to impose a Lis Pendens beyond that which could have been affected by any decision of the Court.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY RULED BOTH ON THE LAW AND UPON THE FACTS THAT THE COVEYANCE OF LAND TO DEFENDANTS, CARTER, BY THE PLAINTIFFS DID NOT IMPOSE A CONSTRUCTIVE TRUST.

The law of this State requires that the creation of a trust over real property must be based upon a written instrument subscribed by the party creating the trust. 25-5-1, Utah Code Annotated, 1953, as amended:

> No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. [emphasis supplied]

An exception to such requirement exists where the law imposes as an equitable remedy, a constructive trust.

To overturn the written instrument and establish the constructive trust the burden of persuasion is upon the party claiming the existence of the trust to establish such by clear and convincing evidence.

As stated by this Court in Jewell v. Horner, (1961) 12 Utah 2d 328, 366 P.2d 594, at page 333:

> . . . the authorities are practically uniform to the point that to justify a court in determining from oral testimony that a deed which purports to convey land absolutely in fee simple was intended to be something different, such as a trust, such testimony must be clear and convincing. [emphasis supplied]

The Court went on to cite with approval Chambers v. Emery, (1896) 13 Utah 374, 45 P., 192, and the Court's statement therein at page 392:

> In such event the proof must be strong, clear and convincing, such as to leave no doubt of the existence of the trust. Such a case is similar to one where it is attempted to convert a deed absolute into a mortgage, or where the reformation of a written instrument is sought on the ground of accident, mistake, or fraud. In all such cases the court will scrutinize parol evidence with great caution, and the plaintiff must fail unless it is clear, definite, unequivocal, and conclusive. [emphasis supplied]

In Paulsen, et al. v. Coombs, et ux., (1953), 123 Utah 49, 253 P.2d 621, at page 56 this Court said:

> The question of whether evidence is sufficient to be clear and convincing is primarily for the trial court; his finding should not be disturbed unless we must say as a matter of law that no one could reasonably find the evidence to be clear and convincing.

The Restatement of the Law of Trusts in Section 45 reads:

> Where the owner of an interest in land transfers it inter vivos to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust is signed, as required by the Statutes of Frauds, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the third person, if, but only if,

(a) the tranferee by fraud, duress or undue influence prevented the transferor from creating an enforceable interest in the third person, or

(b) the transferee at the time of the transfer was in a confidential relation to the transferor, or

(c) the transfer was made by the transferor in anticipation of death. [emphasis supplied]

This Court has cited with approval as the law in this State the above section of the Law of Trusts in the determination of the criteria for establishment of a constructive trust. Haws v. Jensen, (1949) 116 Utah 212, 209 P.2d 229. Thus, in only three circumstances will the Court impose constructive trusts as an equitable remedy: (a) where the transferee obtained the property by fraud, duress or undue influence; (b) where the transferee was at the time of transferring in a confidential relation with the transferor; and (c) where the transfer was made in anticipation of death. The evidence in the case now before the Court clearly eliminates the claim of a transfer obtained by fraud, duress or undue influence or a transfer made in the anticipation of death. The only criteria remaining now on which Appellants rely is that the transferor and transferee were in a confidential relationship. This matter will be dealt with more completely in Point II of this Brief.

In Peterson v. Peterson, (1943) 105 Utah 133, 141 P.2d 882, the transferee was the brother and as stated by the Court at page 135:

The plaintiffs because of the fact that Charles was their brother and because of their long deal-

> ings with him in the partnership relied upon said representations and signed quit claim deeds to Charles. [emphasis supplied]

Under such circusmtances the Court held the imposition of the trust to contravene the deed, absolute on its face.

In Haws v. Jensen, supra., the transfer was between a mother and daughter and the Court said at page 216:

> Admittedly there is no writing evidencing Mrs. Haws' intention that the property conveyed by her be held in trust by Amber.

In the case now before the Court, the usual circumstance for establishing a constructive trust are not present; that is, a transfer by deed without any further agreement evidencing the intention of the transferor. In this case there was not only the deed transferring the property to the Defendants (Ex. 2), but a contractual agreement spelling out the terms and conditions of the transfer drawn by an attorney and executed by the parties in the presence of their daughter and the attorney. (Ex. 1) The need for the essential element of the confidential relationship is further shown in Haws v. Jensen, supra., when the Court said at page 217:

> Thus this allegation along with the fact that the grantor and grantee were mother and daughter, which appears on the face of the complaint, is a sufficient allegation of a confidential relation. Scott on Trusts, Vol. I, Sec. 44.2 states:
>
> > 'A constructive trust is imposed even if there is no fiduciary relationship such as that between attorney and client, principal and agent, trustee and bene-

> ficiary; it is sufficient that there is a family relationship or other personal relationship of such a character that the transferor is justified in believing that the transferee will act in his interest. [emphasis supplied]

In 1953, this Court found facts sufficient to impose a constructive trust in Hawkins v. Perry, et al., (1953), 123 Utah 16, 254 P.2d 372, when at page 24 it said:

> At the time Hawkins gave Perry the money the former was a boy of 16; he was acting under the advice of Mr. Perry, who was an older man, his relative, and a minister of the gospel. These circumstances satisfy the requirement that a confidential relationship exist as a foundation for the imposition of a constructive trust as decreed by the trial court. [emphasis supplied]

In Jewell v. Horner, (1961), supra., this Court overturned a trial court finding of a constructive trust holding that the evidence did not establish such trust by clear and convincing evidence and distinguished Haws v. Jensen, supra., at page 334 by pointing out that in Haws there was no consideration for the transfer and in Jewell there was a consideration paid for the transfer. In the case now at bar, Defendants Carter paid $19,100 for the conveyance of the property pursuant to the terms of the contract. (Ex. 1) Surrounding jurisdictions have held to the same rulings as the Utah decisions. The Oklahoma case of Peyton v. McCaslin, (1966), 417 P.2d 316, and the Colorado case of Austin v. Wysowatcky, (1973), 511 P.2d 526.

In each of the Utah cases which have ruled that a constructive trust existed, there has been a family, or other

fiduciary relationship between the transferor and the transferee:

> Peterson v. Peterson, supra., - transfer by family members to their brother;
>
> Haws v. Jensen, supra., - transfer by mother to daughter;
>
> Hawkins v. Perry, supra., - tranfer by youth to advisor, his relative and minister; and in
>
> Jewell v. Horner, supra., - transfer by father to daughter, but trust was denied because consideration was paid.

In the case now before the Court the Defendant Blanch G. Carter never had any dealings with the Plaintiffs prior to this litigation. The Defendant Bert Carter was a purchaser of property having no prior transactions or business relationship or personal relationship with the Plaintiffs. (Tr. 26, lines 17-20; Tr. 52, lines 22-26) The transaction was formulated in a written agreement (Ex. 1), coupled with a deed, (Ex. 2) and a consideration was paid in the amount of $19,100.00 for the purchase of the property.

The trial court never lost sight of the fact that in this case an agreement was entered into between Plaintiffs and Defendants on the 18th day of May, 1966. (Ex. 1) That by that agreement Defendants agreed to make payments of $19,100 in annual installments of $3,000 to the Plaintiffs for the purchase of the property. That the agreement provided for forfeiture of payments made in the event that the Defendants did not complete their payments. Defendants agreed further to pay all taxes and assessments upon the property after the date of the execution of the agreement and to keep all

insurable buildings and improvements on the premises insured in a company acceptable to the Plaintiffs in an amount not less than the value of the buildings. The agreement further provided that the Defendants of the property upon failure to pay taxes, assessments or insurance premiums would be subject to three-quarters of one percent per month interest on said sums advanced by the Plaintiffs until repaid by the Defendants.

A further paragraph of significance in the transaction is the paragraph on the third page of the agreement (Ex. 1) which reads as follows:

> It is hereby expressly understood and agreed by the parties hereto that the Buyers accept said property in its present condition, and will require marketable title only to the title description, but will acquire title to all the land lying within the fence line it being understood that the Buyers shall have the right to perfect title in themselves to all lands lying within the fence line.

These provisions in the agreement show the rights of the Defendants to the property as their own and refutes any claim of trust by such provision. To construe under such provision of the agreement that the Defendants were holding the property in trust for other persons is inconceivable. A further provision was included in the agreement between the Defendants and Plaintiffs that in the event of default by the Defendants (buyers) they subjected themselves of the payment of attorney's fees from enforcing the agreement. This, too, refutes any claim of trust and verifies the buyer-seller relationship. This was an arm's-length buyer-seller transaction clearly evidenced by the agreement and the

deed that transferred title at the time of the execution of the purchase agreement.

Thereafter, on the 5th of May, 1972, upon completion of the payment of the $19,100, the Plaintiffs marked upon the face of the agreement "paid in full $19,100" and both of the Plaintiffs signed said notation. At that time they made no mention to the Defendants of the alleged four (4) lots that were suppose to be held in trust. (Tr. 96, lines 27-30; Tr. 97, lines 1-3) As spelled out in their testimony no question was raised by them at the time of the payment of the entire purchase price as to the existence or status of the alleged lots to be held in trust.

The trial court correctly applied the Utah decisions regarding constructive trusts to the facts in this case and held: (a) there was no showing that there was any agreement by the Defendants Carter to hold the said lots in trust; and (b) that there was no constructive trust imposed by law as an equitable remedy. By definition, the constructive trust is a remedy imposed where one party has taken advantage of the other in failing to honor an oral agreement to hold property in trust for another. In this matter the trial court's finding on the factual issue was that there was not a preponderance of the evidence let alone clear and convincing evidence that there was any agreement by Defendants Carter to hold the lots in trust and, therefore, the constructive trust must fail.

POINT II

THE TRIAL COURT CORRECTLY RULED THAT THERE WAS NOT A CONFIDENTIAL RELATIONSHIP BETWEEN THE PLAINTIFFS AND THE DEFENDANTS UPON WHICH A CONSTRUCTIVE TRUST COULD BE PREDICATED.

As stated in Appellants' brief, the trial court properly recognized that one of the preconditions for the imposition of a constructive trust is the existence of a confidential relationship between the parties which caused the grantor to rely on the assurances of the grantee. Although in this case the trial court held that there was no representation or agreement by the Defendants that they would hold the alleged four (4) lots in trust, Plaintiffs' ostensible quotation from the Haws case contained on page 12 of Appellants' brief is an amalgamation of several quotes from the case taken out of context without the intervening explanation. At page 217 of the Haws case, supra., speaking through Justice Wolfe the court quoted from Scott on Trusts, Vol I, Sec. 44.2 that a fiduciary relationship is not necessary to establish a confidential relationship, that:

> . . .it is sufficient that there is a family relationship or other personal relationship of such a character that the thransferor is justified in believing that the transferee will act in his interest. [emphasis supplied]

In the case now before the Court the Defendants were negotiating for purchasing land from the Plaintiffs. This was the first business dealings and first transactions between

the parties. (Tr. 26, lines 17-20; Tr. 52, lines 22-26) As previously cited in this brief, all of the Utah decisions defining a constructive trust were based upon a confidential relationship having to do with family relationship or fiduciary relationship not a simple buyer-seller relationship. Plaintiffs assert that the acknowledgement in the agreement on page 3 of Exhibit 1 that the sellers had full trust and confidence in the buyers establishes the confidential relationship. But as pointed out in Ampuero v. Luce, et al., (1945), 68 CA 2d 811, 157 P.2d 899, at page 903:

> This brings us to the appellant's claim that the evidence discloses without contradiction that 'a relationship of trust and confidence existed between Mrs. Luce and Mrs. Ampuero'. No evidence whatever is pointed out to show that such relation beyond the fact that they had been close friends since girlhood, had corresponded, visited back and forth, and Mrs. Ampuero considered the respondent the most reliable friend she had. It is conceded by respondent's counsel that Mrs. Ampuero had confidence in Mrs. Luce. But that is not to say that a confidential or fiduciary relation, as those terms are used in the authorities . . [authorities cited] . . existed between them.

The Court there quoted from Brison v. Brison, 75 Ca 525, 17 P. 689:

> It is not every case where parties trust each other that the law recognizes as confidential. Ampuero v. Luce, et al., supra., at 904.

In Stienberger v. Stienberger, (1943), 60 CA 2d 116, 140 P.2d 31, the Court said:

> The cases are clear that where there is some sort of a status between the grantor and grantee, and confidence is imposed, a constructive trust will be imposed upon repudiation of the oral promise to reconvey. Thus actual trust and confidence, plus the relationship of parent and child, is sufficient.

and went on to cite many cases where the relationship was essential to the imposition of the constructive trust.

In Peterson, supra., this Court further announced when it cited from Scott on Trusts that there are numerous cases to the effect that where at the time of the transfer the transferee was in a confidential relationship to transferor and the transferor relied on an oral promise to reconvey the land the transferee is chargeable as constructive trustee of the land for the transferor. The trial court in this case did not find that the transferee, Defendants Carter, made any such oral promise to reconvey the land, and even if it had made such finding, there is no showing that there was the confidential relationship between the parties as contemplated by the Court in the Peterson case. The provision in the purchase agreement (Ex. 1) asserted by plaintiffs as the basis for establishing the confidential relationship is more than offset by the further provisions in the agreement requiring the (a) payment of consideration; (b) subjecting them to liability of attorney's fees in the event of default; (c) payment of taxes and insurance premiums; and (d) the other provisions of the purchase agreement imposing obligations upon the Defendants together with the fact

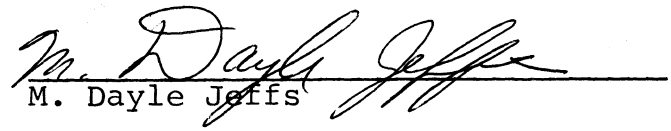
that the agreement makes no reference to the alleged trust. Plaintiffs cite Adams v. Bloom, (1943) CA 2d 315, 142 P.2d 775, a California case, as a basis for holding in this case that there was a confidential relationship. The evidence in this case does not show that the parties to this transaction were friends other than the relationship that existed through the negotiations of this transaction (Tr. 52, lines 22-26), or that the plaintiffs reposed any confidence in the grantees other than through this transaction. There existed an advisory business relationship between the parties in the Adams case cited by Plaintiffs upon which a confidential relationship was held to exist. The Adams case held four (4) factors as combining to impose the confidential relationship. Those four (4) elements were: (a) parties were friends; (b) reposing confidence in grantee; (c) advisory business relationship; and (d) transferor of advanced age. The Adams case is quite different factually from the case now at bar since we do have a written agreement setting forth rights and obligations as between the Plaintiffs and Defendants. It is to be expected that all parties who contract with each other for the sale and payment of future payments under a contract must repose some confidence or they would be foolish to enter into the transaction. This is not to say that this imposes a confidential relationship as contemplated in the law of constructive trusts.

Plaintiffs allege that the statements in the legal documents, the lack of specificity, prior dealings of the parties and agents and acts of Plaintiffs Archie and Sylvia Nielson all clearly show that the relationship was one of trust and confidence. The transcript shows quite the contrary. Plaintiffs Archie and Sylvia Nielson secured separate legal counsel to evaluate the transaction. (Tr. 28, lines 28-30; Tr. 29, line 1) There were no prior dealings between the parties. The trial court's conclusion that there was not a confidential relationship existing between the Plaintiffs and Defendants is the only conclusion the Court could make based upon the evidence presented to the Court.

CONCLUSION

The trial court as the trier of the fact in this case correctly concluded that Defendants did not enter into any oral agreement to hold four (4) lots in trust for the Plaintiffs or for the Rasmussens. It correctly found that there was no confidential relationship between the parties and no constructive trust to be imposed by the Court. The decision was fully in line with all of the Utah decisions regarding constructive trusts and the facts present in this case.

Respectfully submitted.



M. Dayle Jeffs

CERTIFICATE OF SERVICE

I hereby certify that two copies of Brief of Respondent were delivered to G. Rex Lewis of Howard, Lewis & Petersen, Attorneys for Plaintiffs-Appellants, 120 East 300 North, Provo, Utah 84601 this 15th day of June, 1976.

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